STATE OF MICHIGAN

IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

Plaintiffs-Appellants

vs.

MEMORIAL HOSPITAL, et al.

Defendants-Appellees

_____/

Supreme Court No.

Court of Appeals No. 251110

Lower Court No. 01-007289-NH

AMICUS CURIAE BRIEF OF THE NATIONAL NOTARY ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS' CROSS-APPLICATION FOR LEAVE TO APPEAL

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Amicus Curiae says "Yes".

Plaintiffs-Appellants say "Yes".

Defendants-Appellees say "No".

II. WHETHER THE U.S. CONSTITUTION REQUIRES MICHIGAN TO RECOGNIZE THE NOTARIZATION PERFORMED BY THE PENNSYLVANIA NOTARY IN THIS CASE, WITHOUT AN ADDITIONAL SPECIAL CERTIFICATE OF AUTHORITY?

Amicus Curiae says "Yes".

Plaintiffs-Appellants say "Yes".

Defendants-Appellees say "No".

STATEMENT OF INTEREST

The National Notary Association, founded in 1957 and based in Los Angeles, California, is the largest and most active professional organization for Notaries Public and is the nationwide representative of the Notary office. Comprised of more than 280,000 members throughout the country, the National Notary Association recognizes an obligation to assist this Court on important issues of law which would substantially affect the daily practice of Notaries and the legal enforceability of notarial acts in the orderly administration of justice in the trial courts of this state. Indeed, the National Notary Association sponsored and published both the Model Notary Act of 1984 and 2002. In particular, this case presents significant issues concerning the evidentiary consequences of the Michigan statute in question and the implications of that statute on the full faith and credit doctrine embodied in the US Constitution, both of which the National Notary Association respectfully requests the Court to allow it to address. See generally, Milton G. Valera, The National Notary Association: A Historical Profile, 31 John Marshall Law Review 971 (1998).

STATEMENT OF FACTS

Amicus Curiae, the National Notary Association, hereby incorporates the Statement of Facts and Proceedings contained in the brief filed in this Court on behalf of Plaintiffs-Appellants, Sue H. Apsey and Robert Apsey, Jr.

ARGUMENT

I. Pursuant to MRE 902(1), any out-of-state affidavit that possesses the seal of a Notary is self-authenticating because the seal is presumed genuine. Absent the introduction of evidence tending to show fraud or forgery, the Notary's official seal is not required to be further authenticated or certified by extrinsic evidence.

The Michigan Supreme Court should grant Plaintiffs' application for leave to appeal and accept this case for review because the decision of the Michigan Court of Appeals results in an inconsistency with the Michigan Rules of Evidence. Determination of the legal enforceability of a notarized document, including an affidavit, consists of a two-tiered analysis centered on: (1) admissibility and (2) authorization. *See 7 J. Wigmore, Evidence* §§2161 – 2169 (1978). First, as a condition precedent to admissibility, the document must be authentic, or, in other words, found to be genuine, unaltered, and trustworthy by virtue of the Notary's seal. MRE 902(1). In the absence of a Notary seal, the use of a Notary's signature alone to authenticate a document requires that the Notary be certified by a higher public official possessing a seal. MRE 902(2).

Second, to be deemed enforceable, the specific type of notarial act must have been expressly authorized pursuant to the laws of the Notary's state and performed in compliance with all applicable notarial procedures, including the use of a valid and secure seal. Uniform Recognition of Acknowledgments Act (URAA), MCL 565.261, *et* seq.[1] In addition, the recognition or enforceability of out-of-state notarial acts involves analysis of the full faith and credit clause of the

1 The National Notary Association concurs with Judge Mark Cavanagh's dissent and the arguments raised by Plaintiffs-Appellants and other amici supporting Plaintiffs-Appellants' Cross-Application for Leave to Appeal that the URAA controls and validates the affidavit at issue here and all other properly notarized out-of-state affidavits. Because these arguments are expected to be addressed fully by others, they will not be repeated here.

United States Constitution. *Pierce v Indseth*, 106 US 546, at 549; 1SCt 418 (1883) (authentication by a Notary's seal entitles a document to full faith and credit).

Authentication by seal is a bedrock evidentiary principle of the Michigan Rules of Evidence and Michigan statutory evidence rules, including MCL 600.2102. Specifically, MRE 902(1) requires that documents under seal of a public officer be considered self-authenticating. As a "public officer," a Notary's seal and signature authenticate a document without the need for extrinsic evidence to prove the genuineness of the Notary's signature and official capacity. *Pierce v Indseth*, 106 US at 549; 1 SCt 418 (1883) (Notaries "are officers recognized by the commercial law of the world"); MCL 750.248. Absent a showing of fraud or forgery, the officer's seal is not required to be further certified or authenticated.

Acceptance of the authenticity of a document under seal involves the inference of four items: (1) the fact that the Notary is who he claims to be, (2) the genuineness of the seal, (3) the fact that the seal was affixed by the named Notary, and (4) the Notary's hearsay official statement is admissible. *7 J. Wigmore, Evidence*, §2161. The seal and official status to use the seal are presumed genuine because any forgery of the seal would be fairly easy to detect. *Id.*

In the circumstance that a Notary has attempted to authenticate a document only by affixing the official signature of the Notary, without the seal credential, MRE 902(2) requires that the Notary's signature and official character, in turn, be certified by a higher public officer who possesses a seal of office. This seal must then be affixed to the document. In the present case, however, there is no factual dispute that a valid seal of a Pennsylvania Notary had been affixed to the affidavit and, therefore, the certification requirement of MRE 902(2) does not apply.

With respect to affidavits, MCL 600.2102 reflects the evidentiary tradition of authentication by seal. All four sections of the statute require that a seal be affixed, whether by a clerk of court or some other official. Consistent with MRE 902(2), MCL 600.2102(4) sets forth that, in the event an out-of-state affidavit possesses only the signature of a Notary Public, then the genuineness of the Notary's signature and official character must be certified by a local clerk of court under seal. Again, this additional certification step was unnecessary here because the Pennsylvania Notary's seal is already presumed genuine.

The Court of Appeals, in its decision on reconsideration, erred as a matter of law in ruling that "the signature and the notary seal do not satisfy the requirements set forth in MCL 600.2102(4)." To interpret MCL 600.2102 as requiring extrinsic evidence, in the form of a clerk of court certification, of a Notary seal's genuineness would be clearly inconsistent with the presumption of the genuineness of the seal established by MRE 902(1). In any event, pursuant to MRE 101, the Michigan Rules of Evidence, which govern how evidence is authenticated and admitted, supercede and give clarity to the lack of specific reference to a Notary seal in MCL 600.2102, an evidentiary authentication statute which pre-dates the adoption of the Michigan Rules of Evidence. *See, e.g., Waknin v. Chamberlain*, 467 Mich 329; 653 NW2d 176 (2002) (holding that certain prior evidence law did not survive the adoption of the Michigan Rules of Evidence), citing *People v Kreiner*, 415 Mich 372; 329 NW2d 716 (1982); *McDougall v. Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999) ("It is beyond question that the authority to determine rules of practice and procedure rests exclusively with this Court.")

The Federal Rules of Evidence, upon which the Michigan Rules of Evidence are based, reflect the evidentiary principle of authentication by seal of a public officer as a condition precedent

to that document's admissibility and entitlement to full faith and credit legal enforceability. FRE 902 (1) and (2). It is generally recognized that the risk of forgery is reduced by the requirement of authentication by a public officer who possesses and affixes a seal. See, Advisory Committee Note to FRE 902(2).

Parenthetically, this Court should be aware that several states do not require the use of a physical image of a notarial seal for the performance of a lawful notarization (although no state prohibits the use of a notarial seal). Those states include Connecticut, Kentucky, Louisiana, Maine, New Jersey, New York, Rhode Island, Vermont, and Virginia. Charles N. Faerber, *2004-2005 United States Notary Reference Manual,* (National Notary Association 2003), at 61, 163, 171, 181, 273, 289, 375, 427, and 439. Interestingly, even Michigan law does not require the use of a seal image as such but instead generally requires Notaries to "print, type, stamp, or otherwise imprint mechanically or electronically, clearly and legibly and in a manner capable of photographic reproduction" certain information "immediately near the Notary Public's signature, as is practical." MCL 55.287(2); Faerber, supra at 209. It is the position of the National Notary Association that a certificate of notarization, containing some form of seal informational elements of a duly commissioned Notary, constitutes a lawful notarization in those jurisdictions not requiring a physical image and, therefore, represents the equivalent of a Notary seal for evidentiary purposes. See, e.g. *7 J. Wigmore, Evidence* § 2165 (1978). Furthermore, our position in this regard is consistent with the arguments in the following section in regard to the full faith and credit doctrine.

There are sound public policy reasons why the Michigan Rules of Evidence presume genuine the Notary's seal for purposes of authenticating documents without the need for additional extrinsic evidence in the form of a clerk of court certification. The Michigan Supreme Court should accept

the instant case for review and consider the implications of the Court of Appeals interpretation of MCL 600.2102 that are inconsistent with both the Michigan and federal evidentiary systems.

II. THE U.S. CONSTITUTION REQUIRES MICHIGAN TO RECOGNIZE THE NOTARIZATION PERFORMED BY THE PENNSYLVANIA NOTARY IN THIS CASE, WITHOUT AN ADDITIONAL SPECIAL CERTFICATE OF AUTHORITY.

The Michigan Supreme Court should accept the instant case for review because it was incorrectly decided by the lower courts in that it violates a clear federal constitutional mandate. Moreover, if the Court of Appeals' approval and interpretation of MCL 600.2102 is permitted to stand as a groundless exception to that constitutional mandate, the notarial system in this country may be seriously impeded with resulting substantial harm to commercial and governmental operations. The reason is that there are more than 4.5 million notaries practicing in the U.S. states and territories. "The NNA 2002 Notary Census," *National Notary Magazine*, May 2002, at 12-13. Michigan's recent decisions to enforce the antiquated practice embodied in MCL 600.2102 may cause ripple effects across the jurisdictions and adversely affect the work of those millions of U.S. notaries and millions of the documents on which they perform notarizations each year.

Notarizations are fundamentally important to countless business instruments and transactions. "For a lot of reasons, many millions of notarized documents pass from jurisdiction to jurisdiction in the United States each year. People and businesses move and carry their documents with them across state lines. Parties from multiple jurisdictions enter into commercial transactions, or a business transaction involves multiple jurisdictions. Documents for litigation are prepared in various jurisdictions other than the forum state. And so on." Michael L. Closen, et al., *Notary Law and*

Practice (National Notary Association 1997), at 217. Thus, there is a significant interstate dimension to the notarial system in this country.

In the formative years as the United States was being created, the founders recognized the need among the states to forfeit their full sovereignty in favor of a federal system in which they would cooperate to assure their mutual welfare, including significantly their commercial welfare. In describing the proposal to form a federal union to become a "neighborhood of States," Alexander Hamilton wrote: "The importance of the Union, in a commercial light, is one of those points about which there is least room to entertain a difference of opinion, and which has, in fact, commanded the most general assent of men who have any acquaintance with the subject." Alexander Hamilton, *The Federalist No. 11*, Nov. 24, 1787, reprinted in The Federalist (The Modern Library 2000), at 62. Hamilton went on to advocate for "(a)n unrestrained intercourse between the States," including the "free circulation of the commodities of every part" of the commercial system. *Id* at 67. Little did he know that the commodities circulating in the business arena generally, and in interstate commerce, would come to include millions of documents bearing notarizations. Hamilton then went still further to warn that if the states remained "disunited," the commercial "intercourse would be fettered, interrupted, and narrowed by a multiplicity of causes" of the individual disunited states. Hamilton, supra, at 68. Hence, the founding fathers would take steps to assure a united and uniform procedure to promote commerce across state lines. Yet, what the Court of Appeals has recently decided to do may well fetter and interrupt the notarial system nationwide.

Even before the adoption of the U.S. Constitution, the Articles of Confederation included a limited "full faith and credit" provision. "Full faith and credit shall be given in each of those States to the records, acts and judicial proceedings of the courts and magistrates of each other State."

Articles of Confederation, Art. IV. That provision was greatly expanded in the "full faith and credit" clause of the Federal Constitution: "Full Faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." *U.S. Constitution*, Art. IV, Sect. 1. Thus, the public acts and records of public officials of each state are to be recognized (i.e., full faith and credit is to be accorded).

"The desirability of interstate cooperation in official matters is conspicuous. Federalism can be maintained, while at the same time the rights of the states to undertake many local functions can be preserved. Thus, the drafters of the federal constitution included a provision to achieve interstate recognition of official state acts." Closen, et al., supra, at 217.

Indeed, it has been pointed out that the resulting provision "was one of several constitutional clauses designed to create a single nation from a group of newly independent states." Ralph U. Whitten, "Full Faith and Credit Clause," *Oxford Companion to American Law* (2002), at 324.

"Within the bounds of the public acts and records referenced [in the full faith and credit clause] are notarial acts and any official public records that are created. . . ". Michael L. Closen, *The Public Official Role of the Notary*, 31 John Marshall Law Review 651, 694-695 (1998). Consequently, numerous cases illustrate one U.S. state or territory recognizing a notarial act performed by a notary of another U.S. state or territory. See, e.g., *Nicholson v Eureka Lumber*, 160 NC 33; 75 SE 730 (NC 1912) (North Carolina recognizing a Texas notarization); *Stearns v Chenault*, 15 KyLReptr 347; 23 SW 351 (Ky App 1893) (Kentucky recognizing an Ohio notarization); *Frost v County Officers Electoral Bd*, 285 IllApp3d 286; 673 NE2d 443 (Ill App 1996) (Illinois recognizing a District of Columbia notarization).

Importantly, full faith and credit recognition by sister states and territories is obligatory, not

discretionary, provided the public act, record or judgment was lawful in the U.S. state or territory where it was performed, made or rendered. Article IV, Section 1, declares that full faith and credit "shall" be given in each of the states. Hence, Professors Scoles and Hay note: "Mandatory recognition of a judgment under the [Full Faith and Credit] Clause presupposes a valid judgment of a sister state" (emphasis added). Eugene F. Scoles and Peter Hay, *Conflict of Laws* (2d ed. 1992), at 968-969. Professor Closen reached the same conclusion respecting notarial acts. "Consequently, if a notarial act is lawful in a state or United States territory where it is performed, that notarization must be recognized by other states and territories. Its recognition is not discretionary." Closen, supra, at 695. For example, in *Stearns v Chenault*, 15 KyLReptr 347; 23 SW 351, 351 (Ky App 1893), the Kentucky court concluded that it would recognize an Ohio notarization which was "in compliance with the law of Ohio." In *Nicholson v Eureka Lumber*, 160 NC 33; 75 SE 730 (NC 1912), North Carolina recognized a notarization lawfully performed in Texas by a female notary, at a time when North Carolina still did not allow women to serve as notaries. In the instant case, the Pennsylvania notarization was lawfully performed under its law and bore the standard indicia of a lawful notarization (a notarial seal, notarial certificate, and notary's signature). Michigan was, therefore, required by the full faith and credit clause to recognize that Pennsylvania notarization "as is." For Michigan to require supplemental certification would violate the full faith and credit clause.

In our federal system, the official acts of all public officials – judges, county clerks, recorders of deeds, court clerks, notaries public, and others – must be entitled to interstate recognition. "[I]t is the public official feature about the notary that inspires reliability. It is not a mere private citizen who notarizes a signature. Rather, a public officer, bound by that official responsibility, authenticates and certifies the signature. [T]he notary seems not to be merely a statewide officer, but

rather the notary is a virtual national and international official." Closen, *supra*, at 694. In 1883, the U.S. Supreme Court concluded that notaries "are officers recognized by the commercial law of the world." *Pierce v Indseth*, 106 US 546, 549; 1 SCt 418 (1883). In 1890, the Minnesota Supreme Court observed, "A public notary is considered not merely an officer of the country where he is admitted or appointed, but as a kind of international officer, whose official acts, performed in the state for which he is appointed, are recognized as authoritative the world over." *Wood v St. Paul City Ry Co*, 42 Minn 411; 44 NW 308 (1890). The "world over" surely includes the State of Michigan. And, recognition of the Pennsylvania notarization as performed satisfies the fundamental purpose of the federal constitution's provision on interstate recognition. "It is the purpose of the Full Faith and Credit clause to insure extraterritorial effect for the government acts of a state and to provide a uniform nationwide rule where needed." Scoles & Hay, *supra*, at 102.

Yet, in the instant case, the lower courts of Michigan have approved the statute and interpreted that statute to require "*special certification* to authenticate the credentials of the out-of-state notary public" (emphasis added). *Apsey v Memorial Hospital*, No. 241110, opinion filed April 19, 2005, page 1. The Court of Appeals characterization of the statutory provision as a "special certification" not otherwise required of a lawful Pennsylvania notarization represents the fatal constitutional infirmity in the present case. Michigan simply cannot constitutionally impose supplemental requirements upon the notarization of the other states.

That the special Michigan notary certification statute in question here is antiquated is shown by at least two facts. First, its origin is quite old, dating to at least to the 1800s (if not earlier). See e.g. *Pape v Wright*, 116 Ind 502; 19 NE 459 (Ind 1889) (in which a New York notarization included the attached certificate of notarial authority from a county clerk). Also, a provision comparable to

the special Michigan provision was included in the 1892 *Uniform Acknowledgments Act*, Sections 3, 4, and again in the 1939 *Uniform Acknowledgment Act*, Section 9 (2). Incidentally, the National Notary Association is baffled as to why these practices were adopted without apparently ever being challenged as violative of the full faith and credit doctrine. Thankfully, this special supplemental certificate process was abandoned in the 1968 URAA, Section 2(a), (d)[2]; and again in the 1982 *Uniform Law on Notarial Acts*, Section 4 (a), (c), (d). Moreover, only 8 states had adopted either or both of the 1892 and 1939 uniform laws in the first place. However, 6 of those states still have either the 1892 or 1939 uniform laws on their books (Arkansas, Louisiana, Maryland, Massachusetts, Pennsylvania, Rhode Island, and South Dakota), without having adopted one of the newer (1968 or 1982) uniform laws. See Charles N. Faerber, *2004-2005 U.S. Notary Reference Manual* (National Notary Assn. 2003), at 481-482 (Appendix 1: Table of Enactment of Model and Uniform Laws). The National Notary Association has found no information indicating this special notarial certification is actually being enforced or required for interstate notarizations anywhere other than in Michigan. Lastly on this point, we can be virtually assured that, after finding out about Michigan's rediscovery and enforcement of this special notary certification, enterprising lawyers in other states (especially Arkansas, Louisiana, Maryland, Massachusetts, Pennsylvania, and South Dakota) will assert their states' otherwise dormant statutory requirements as the bases to attack transactions and to bar documents from evidence if such instruments bear out-of-state notarizations.

Second, the special notary certification is outdated and cumbersome. It requires a two-step process for a valid notarization: (1) the usual visit to a notary public for a notarization; and (2) a

2 As noted above, the National Notary Association concurs with arguments fully raised and briefed by Plaintiffs-Appellants and other supporting amici that the URAA controls and validates the affidavit at issue here.

separate visit to a second public official (a court clerk, or some other alternate public officer). This interrupts and fetters the otherwise efficient notary process which has been established among the jurisdictions for the more than 4.5 million U.S. notaries. It will take more time and will cost more money. The federal system of recognition of interstate notarizations has worked satisfactorily without the need for this more burdensome practice.

What may be the other consequences of Michigan's decision to retreat to the antiquated practice of requiring out-of-state notarizations to be supplemented by special certificates of authority? Should the other states retaliate? The other states and territories might adopt laws requiring notarizations performed in Michigan to be accompanied by such certificates of authority if those notarizations are sought to be recognized in the other states and territories. Or, more generally, the other states and territories may adopt reverse reciprocity laws announcing that if any state (such as Michigan) should require certificates of authority to accompany the notarizations of their notaries, then the notarizations sought to be recognized from states having supplemental authority laws would also have to be accompanied by certificates of authority.

Furthermore, consider the burden the recent Michigan decision places upon the millions of notaries in the other states and territories, upon the many more millions of document signers who seek notarizations of their signatures, and upon the even more millions of third parties affected by such notarizations (such as bankers, lenders, sellers, purchasers, lawyers, health care providers, and others who rely upon notarized instruments). Must many of these millions of parties in other jurisdictions now take the precaution of obtaining a special certificate of notarial authority in case some time in the future the instrument in question is sought to be recognized in Michigan? It may seem prudent to do so, because months or years later it might be especially difficult to obtain a

certificate of authority (if the notary in question has died, moved, or resigned, or if old notary rolls are not readily available).

There are sound public policy reasons why the founders included the expanded full faith and credit clause in the U.S. Constitution. The Michigan Supreme Court should accept the instant case for review and consider the federal constitutional implications of reviving an outdated statute on our national notarial system.

III. CONCLUSION

Should this Court conclude that MCL 600.2102 has been superseded by the modern rules of evidence and is inapplicable to the analysis of the recognition of out-of-state notarial acts, then the surviving Michigan notarial law will square both with the Michigan evidentiary authentication laws and the United States Constitution's full faith and credit mandate.

RELIEF REQUESTED

Based on the foregoing, the National Notary Association respectfully requests that this Court grant it permission to file an amicus curiae brief in the pending appeal, accept the instant filing as that amicus curiae brief, grant Plaintiffs-Appellants' Cross-Application for Leave to Appeal, reverse the Court of Appeals, and hold that the affidavit at issue is valid. In the alternative, the Court should summarily reverse the decision of the Court of Appeals.

Respectfully submitted,
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